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December 16, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 28, 2009

Case Number: TSO-0796

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." ¹ For the reasons set forth below, I conclude that the individual's security clearance should not be restored at this time. ²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, and was granted a security clearance in connection with that employment. During a routine reinvestigation, the Local Security Office (LSO) learned that the individual had not filed federal or state income tax returns for the years 2002 through 2008. Because this information raised security concerns, the LSO summoned him for an interview with a personnel security specialist in May 2009. After this Personnel Security Interview (PSI) failed to resolve these concerns, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. They informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced nine exhibits into the record of this proceeding. The individual introduced one exhibit and presented the testimony of one witness, in addition to testifying himself.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

A. The Notification Letter

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Under criterion (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security. Such conduct include[s], but [is] not limited to, criminal behavior [or] a pattern of financial irresponsibility" 10 C.F.R. § 710.8(l). As support for this criterion, the Letter cites the individual's admission that he has not filed state or federal income tax returns for the years 2002 through 2008, and alleges that he ignored the fact that he needed to file these returns and pretended that the problem did not exist. The Letter further states that the individual received letters concerning his failure to file tax returns, but failed to contact the appropriate authorities or make any arrangements with them, and that, eventually, he stopped opening the letters because he knew what they contained.

B. The DOE's Security Concerns

It is undisputed that the individual did not file the returns in question, or make any arrangements with federal or state tax authorities, until after his October 2009 hearing. However, in his response to the statement of derogatory information, the individual contends that his conduct does not rise to the level of conduct that is unusual, tends to show that he is not honest, reliable or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress. In essence, the individual challenges the DOE's application of criterion (l), and argues that the nexus between that conduct and a threat to national security "is very, very attenuated." Hearing Transcript (Tr.) at 7.

The individual's contentions are without merit. His failure to obey legal requirements for a period in excess of six years that he file state and federal income tax returns is unusual conduct that properly calls into question whether he can be relied upon to obey DOE security rules and regulations. Moreover, criterion (l) specifically applies to criminal behavior or patterns of financial irresponsibility. Willful failure to file federal income tax returns is subject to criminal prosecution

pursuant to section 7203 of the Internal Revenue Code. 26 U.S.C. § 7203. In addition, pursuant to Guideline F, Financial Considerations, of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005) (Adjudicative Guidelines)*, “failure to file annual federal, state or local income tax returns” is a condition “that could raise a security concern and may be disqualifying.” Such a failure “may indicate poor self-control, lack of judgement, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” *Adjudicative Guidelines*, Guideline F. The DOE properly determined that the individual’s conduct raises valid security concerns under criterion (I).

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

At the hearing, the individual attempted to explain his failure to file the tax returns, and to demonstrate, through his own testimony and that of his former supervisor, that he is an honest and reliable person whose security clearance should be restored. The individual testified that in the Spring of 2003, when his 2002 tax returns were due, he was experiencing continuing health problems with his back, neck and shoulders. These problems cause him constant pain, and have necessitated multiple surgeries over the years, including a neck operation in 2004 and shoulder surgery in 2005. The individual added that he has had to receive “a lot” of medical treatment during the period from 2002 until the date of the hearing. Tr. at 21-25. Also, in the Spring of 2003, the individual was

spending “all of [his] free time” doing home repairs on a “fixer-upper” investment property that he had purchased several months earlier. This was, and is “a major undertaking, a whole lot of projects” that the individual still had not completed as of the date of the hearing. Tr. at 25-26. The individual further testified that his father died in April 2003 after a long illness, and that additional time during this period was occupied with managing his father’s affairs and caring for his step-mother after his father’s death. Tr. at 26. The individual filed for an extension of time to file his 2002 tax returns, but because of his health and family issues and his work on the investment property, he did not meet the extended filing deadline. Tr. at 26-27. He stated that he did not file state or federal returns for subsequent years because he erroneously believed that he could not file them until he filed his 2002 returns. Tr. at 28. Eventually, the task of locating and organizing the “mountain of files and paperwork” that were associated with filing his returns for 2002-2008 became “overwhelm[ing].” Tr. at 30, 40. Many of these documents concerned the individual’s avocation as a real estate broker, and his admittedly sloppy record-keeping made assembling these materials “an extremely daunting task.” Tr. at 29.

Approximately one week before his October 2009 hearing, the individual retained the services of a local tax attorney, and provided all of the necessary documents to that attorney. Tr. at 29, 52. Approximately two weeks after the hearing, the individual filed all of his past-due state and federal income tax returns. Individual’s Exhibit 1. According to the individual’s calculations, he did not owe any federal taxes for the years 2002 and 2003, and no state taxes for the years 2002 through 2004. For the years that taxes were owed, the individual remitted \$5,313.37 to the U.S. Treasury and \$757 to the state Department of Revenue. *Id.* Finally, the individual stated that he is a reliable, law-abiding citizen, and that he does not plan to be late with any future tax returns. Tr. at 42-43, 46-47. The individual’s former supervisor testified that the individual is honest and reliable, and that he has not known him to violate the law or DOE security rules and regulations. Tr. at 11, 13-14, 17.

Despite this testimony, I am left with substantial doubts about the individual’s judgement, reliability, and willingness to abide by legal and security requirements. Although I found the testimony about his health problems to be credible, I note that those problems were not so debilitating or time consuming as to prevent the individual from rehabilitating an investment property, volunteering with the Boy Scouts, Tr. at 20-21, or succeeding at his job.³ While these problems, when coupled with the other demands on the individual’s time, may well have justified the extension of time of several months that he received from the IRS, they in no way justify or adequately explain the delay of over six years in filing the individual’s returns. I find it particularly irresponsible that the individual chose to devote a substantial amount of time and energy to renovating an investment property rather than to fulfilling his legal obligation to file his state and federal taxes. Furthermore, his testimony that he believed that he could not file his 2003-2008 tax returns until he filed his returns for 2002, even if true, does not explain his delay of over six years in filing those 2002 returns. At the hearing, the individual suggested that the sheer volume of documents involved and his admittedly deficient record-keeping made the task of filing overwhelming and contributed to the delay. I find this contention to be unavailing for two reasons. First, the task became “overwhelming” because of the

³ The individual’s former supervisor testified that the individual’s job performance was “outstanding,” and that he “could go two or three weeks with no absenteeism whatever,” and then take some time off for medical reasons.

individual's unjustified delay. Second, the individual could have retained assistance, either clerical or professional in nature, to maintain or gather the needed documents and assist with filing the returns. In fact, the record indicates that the individual did, at some unspecified point in the past, retain the services of an accountant. Tr. at 27.

The individual also testified that he was unaware of the impact that his failure to file might have on his eligibility for access authorization. Tr. at 45. However, even after he became aware of the DOE's security concerns, the individual did not move expeditiously to address his tax problems. He stated that he first became aware of the DOE's concerns "in April or May" of 2009. Tr. at 35. However, he did not retain a tax attorney or other tax preparation specialist until October 2009, approximately one week before his hearing. The individual testified that, in the interim, he had preliminary discussions with several professional tax preparers. Tr. at 52-54. Nevertheless, I find it difficult to believe that a diligent search for competent tax assistance would require five or six months, and I am left to wonder whether the returns would still be due if the hearing had not taken place.

That the individual eventually did file his tax returns does not fully compensate for the fact that, for a period of time in excess of six years, the individual essentially ignored his legal obligations to file his state and federal tax returns. This pattern of behavior demonstrated extremely poor judgement, and a disturbing willingness to disregard the law. In my view, the DOE's security concerns under criterion (I) remain unresolved.

V. CONCLUSION

I have thoroughly reviewed the record in this proceeding, including the hearing transcript and the exhibits submitted by the parties, and I conclude that the individual has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual's security clearance should not be restored at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: December 16, 2009